Supreme Court, U.S.
FILED
041570 MAY 17 2005
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

MANI SUBRAMANIAN,
Petitioner,
v.
QAD INC., et al.,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Mani Subramanian
228 Hamilton Avenue, 3F
Palo Alto, CA 94301
Tel: (650) 798-5288
Fax: (650) 798-5001
Email: prosedefendant@yahoo.com

Pro Se Petitioner

QUESTIONS PRESENTED

This action was removed to the District Court from a State Court on the basis of complete preemption under the Copyright Act. The District Court remanded with a brief order. The following question *is currently subject to seriously conflicting opinions in the Circuit Courts.*

Under what circumstances is a District Court's order remanding a case (to state court) reviewable and what is the permissible scope of such review?

1. Whether a Circuit Court can deny jurisdiction to review a remand order when there is *no reasonable way*

(a) to even determine that the District Court, in good faith conducted a preemption analysis; and/or

(b) to rule out the possibility that the decision to remand was indeed discretionary; and/or

(c) to determine the question of appellate jurisdiction without examining the substance of the order.

2. Whether an otherwise reviewable remand order by the District Court becomes unreviewable just because a phrase, e.g., "lack of subject matter jurisdiction", is presented on the face of the order, although the order when considered as a whole contradicts that very phrase.

3. Whether there is jurisdiction in the Circuit Court to *reverse* a remand order that follows and is predicated upon other reviewable orders, interlocutory or otherwise.

LIST OF PARTIES TO THE PROCEEDINGS

A The "QAD" Parties

1. QAD Inc., a Delaware Corporation;
2. QAD Japan K.K.., a Japanese Corporation;
3. QAD Japan Inc.. a Delaware Corporation;
4. John Doordan; and 5. Lai Foon Lee, Individuals

ATTORNEYS FOR THE "QAD" PARTIES ABOVE

William D. Connell, GCA LAW PARTNERS LLP
1891 Landings Drive, Mountain View, CA 94043
Tel: (650) 428-3900 Fax: (650) 428-3901
Email: bconnell@gcalaw.com

B The "ANDERSEN" Parties

5. Arthur Andersen LLP, a Limited Partnership

ATTORNEYS FOR "ANDERSEN"

Frederick Fields, Coblentz, Patch, Duffy & Bass LLP,
One Ferry Building, Suite 200, San Francisco, CA 94111
Tel: (415) 391-4800 Fax: (415) 989-1663
Email: ffields@cpdb.com

C. The "VEDATECH" Parties

6. Vedatech K.K., a Japanese Corporation
7. Vedatech Inc., a Washington State Corporation

ATTORNEYS FOR "VEDATECH"

James S. Knopf, Law Offices of James S. Knopf,
1840 Gateway Drive, 2F, San Mateo, CA 94404
Tel: (650) 627-9700 Fax: (888) 808-5001
Email: jsk@knopflaw.com

RULE 29.6—DISCLOSURE STATEMENT

Petitioner is an individual and as such is not subject to the disclosure requirements of this rule.

Petitioner is the beneficial controlling shareholder of the "VEDATECH" parties, Vedatech K.K.., a Japanese Corporation and Vedatech Inc., a Washington State Corporation, which are on the same side as petitioner in the underlying case and in the appeals in the Ninth Circuit.

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OPINIONS AND ORDERS

Two related appeals were considered together by the Ninth Circuit Court of Appeals, under Ninth Circuit case numbers, 04-16194 ("first") and 04-16416 ("second"). No opinions were issued and none are reported.

The Order denying rehearing was entered on Feb 16, 2005 (Appendix, *infra*, pages A-2 to A-3). The original order dismissing the two appeals was entered on August16, 2004 (App., *infra*, A-4 to A-5). The show cause order in the first appeal, 04-16194, preceding the procedural dismissal, was entered on June 17, 2004 (App., *infra*, pages A-6 to A-7).

THE BASIS FOR JURISDICTION

The Ninth Circuit Court of Appeals' order denying the timely motion for rehearing was entered on February 16, 2005 (App., *infra*, A-2 to A-3). This petition for a writ of certiorari is being filed on May 17, 2005, within the 90-day period permitted by the Rules of the Supreme Court of the United States, rule 13(1). The Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

THE STATUTES INVOLVED IN THIS CASE

The relevant parts of the statutes relied upon are reproduced in the Appendix, at pages A-25 to A-26.

STATEMENT OF MATERIAL FACTS

On March 15, 2004, petitioner (and related parties) removed this action from the State Court to the Federal District Court on the basis of complete preemption (of the state law claims of respondent-plaintiffs,) by the Copyright Act, 17 U.S.C. §§101 et. seq. On March 23, 2004, the District Court issued a *sua sponte* show cause order requesting briefs in favor of the presence of a federal question. (App., *infra*, A-9 to A-17). On April 29, 2005, the District Court issued a short remand order, without any explanation or other opinion, returning the case to State Court (App., *infra*, A-8). On appeal to the Ninth Circuit Court of Appeals as 04-16194, the Ninth Circuit issued a show cause order regarding its own appellate jurisdiction, (App., *infra*, A-6 to A-7). On August 16, 2004, the Ninth Circuit concluded it did not have jurisdiction because of the straightforward operation of 28 U.S.C. §1447(d), (App., *infra*, A-4 to A-5). A motion for rehearing was rejected by order of February 16, 2005, (App., *infra*, A-2 to A-3). A second removal by petitioner based on newer evidence was remanded by the same District Court Judge, App., *infra*, A-18 to A-19), after rejecting requests, *inter alia*, for the Judge to recuse themselves because of the pendency of the appeal of their prior remand order, App., *infra*, A-20 to A-24. The Ninth Circuit did not consider the matter of the second removal, 04-16416, separately but disposed of it also by means of the joint orders made in Case No. 04-16194.

LEGAL ARGUMENT

Petitioner respectfully submits that a writ of certiorari must issue because, *inter alia*:

1) There is a serious circuit split regarding the jurisdiction to review such remand orders, the standards to adopt in reviewing such remand orders, and the jurisdiction of the circuit courts to so review—the Tenth and Third Circuits are in direct conflict with the Ninth Circuit

A. The position of the Tenth Circuit

The Tenth circuit explicitly requires the District Court to approach the decision to remand by means of a "good faith" analysis as to the grounds for removal to federal court. See, e.g., *Archuleta v Lacuesta*, 131 F.3d 1359 (10th Cir. 1997) at p.1362, **(emphasis added):**

> A district court's assertion that it lacks subject matter jurisdiction and even explicit reference to *§1447(c)*, does not automatically render a remand order non-reviewable under *§1447(d)*. See *Flores*, 110 F.3d at 732. In *Flores*, we explained that **we will determine by independent review the actual grounds upon which the district court believed it was empowered to remand.** *Id.* The district court need not be correct in its determination that it lacked subject matter jurisdiction, however, **so long as it made that determination in good faith.** See *id.*, at 733.

This is also reiterated in the decision in *Kennedy v Lubar*, 273 F.3d 1293 (10th Cir. 1997), at p.1297:

> [**emphasis added**] ...28 U.S.C. §1447(d) states that, subject to certain exceptions not applicable here, "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise..." **This strong statutory limitation on appellate review applies, only however to remands based on 28 U.S.C. §1447(c).** *Albertson's Inc. v. Carrigan*, 982 F.2d 1478, 1479-80 (10th Cir. 1993). See also *Dalrymple v. Grand River Dam Auth.*, 145 F.3d 1180, 1184 (10th Cir. 1998). Section 1447(c) specifically allows district courts to order remand if there has been a "defect in removal procedure," or if it determines, at any time prior to final judgment, that it "lacks subject matter jurisdiction." If a district court orders remand on either of these grounds, §1447(d) absolutely prohibits appellate review of the order, and we adhere firmly to this prohibition even where we believe that the district court was plainly incorrect. *Archuleta v Lacuesta,* 131 F.3d 1359, 1363 (10th Cir. 1997).
>
> In determining whether or not a district court remanded a case on grounds provided in §1447(c), **"we must independently review the record** to determine the actual grounds upon which the district court believed it was empowered to remand." *Dalrymple*, 145 F.3d at 1184. "**An explicit reference**

to §1447(c) does not automatically render a remand order non-reviewable... Nor does the absence of such a reference automatically confer appellate jurisdiction over a remand order." *Id.* (citation omitted). **Thus, we must consider a district court's order of remand as a whole, reviewing it in its entirety and considering the motions and issues actually before the district court.**

B. Third Circuit in *accord* with the Tenth

In *Feidt v. Owens Corning Fiberglass Corp.*, 153 F.3d 124 (3rd Cir. 1998) at p.128, the Third Circuit emphatically agrees with this position:

> Section 1447(d), in prohibiting review of remand orders, contemplates that district courts may err in remanding cases. See *Thermtron*, 423 U.S. at 342, 96 S. Ct. at 589; *Liberty Mutual*, 48 F.3d at 750. Indeed, "no matter how faulty we might consider the district court's reasoning or methods, section 1447(d) prohibits us from reviewing an action the district court was empowered to take, and one that Congress intended to be final." *Liberty Mutual*, 48 F.3d at 750-51. **n2** The district court's authority, indeed obligation, to determine whether a removal petition properly invokes its removal jurisdiction necessarily includes the authority to construe the complaint upon which the court makes its determination. Upon review

of the district court decision, we find that the district court made a good-faith construction of the complaint and examination of the record and then concluded that it lacked subject matter jurisdiction. See *Archuleta v. Lacuesta*, 131 F.3d 1359, 1363 (10th Cir. 1997) (reviewing district court's remand order to determine actual grounds for remand rather than accepting the court's reference to section 1447(c) or assertion of subject matter jurisdiction as rationale).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 It would be bizarre to hold that a court of appeals could review a remand order only if erroneous, as in that circumstance the jurisdictional determination would be a merits determination.

C. The Ninth Circuit has adopted, in this case, precisely the circular logic criticized forcefully by the Third Circuit (see footnote 'n2' in the extracted passage above)—it dismissed the appeal procedurally by denying appellate jurisdiction, simply by citation to §1447(d)

The decision of the Ninth Circuit to deny jurisdiction is explained curtly in the order of dismissal dated August 16, 2004 (Appendix, *infra*, pages A-4 to A-5):

> [...] See 28 U.S.C. §1447(d); *Levin Metals, Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312 (9th Cir. 1986). [...]

The June 17, 2004 order referred to above, (App., infra, A-6 to A-7) is equally focused on reciting §1447(d):

> [...] A review of the record suggest that this court may lack jurisdiction over the appeal because an order remanding for lack of subject matter jurisdiction generally is not appealable. See 28 U.S.C. §1447(d).

Equally so, the reference to *Levin Metals, supra*, also illustrates that the Ninth Circuit does not test the remand order for more than formal invocation of the grounds stated in §1447(c). *Levin Metals, supra*, deals with this matter in a single sentence, and that too in the most general sense possible. See *Levin*, 799 F.2d at p.1314:

> The district court's order remanding the Levin Metals action to state court on the ground of lack of jurisdiction is not reviewable in this appeal. 28 U.S.C. § 1447(c), (d). See *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 351 [...]

Thus, it is clear that the Ninth Circuit's analysis has no place for reviewing the merits of the remand order and certainly does not extend to the "good faith" requirement set out by the Tenth Circuit and adopted by the Third Circuit. It is also clear that the procedural mechanism that the Ninth Circuit chose to dispose of the case (i.e. a show cause notice issued by a staff attorney and summary dismissal following the same) confirms that in determining jurisdiction, the Ninth Circuit determined the merits of the appeal without touching upon the latter.

D. The Supreme Court has not yet defined the standards for appellate review for determining if a remand order is indeed based on §1447(c)

In a series of decisions, this Court (i.e., the US Supreme Court), has limited the ability of District Courts to rely upon the apparent protection Congress has given to such first instance decisions: viz., the provisions of 28 U.S.C. §1447(d) that attempt to broadly prohibit appellate review of such remand orders. In *Thermtron Products v. Hermansdorfer*, 423 U.S. 336, 345-346 (1976) this Court decided that mere reference to §1447(d) is not "dispositive of the reviewability" of remand orders and that it must be read in "*pari materia*" with the sister subsection §1447(c). In *Quackenbush v Allstate Insurance Co.*, 517 U.S. 706, 732 (1996), this Court further explained that abstention-based remands are appealable, and indeed, that such remand orders were "unwarranted" because the relief sought was neither discretionary nor equitable. In *Brockman v Merabank*, 40 F.3d 1013, 1017 (9th Cir. 1994), the Ninth Circuit, referring to this Court's decision in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 356 (1988) affirmed that the District Courts have an "unflagging obligation" to exercise their jurisdiction when such jurisdiction was properly invoked. The question remains then as to what standards a court of appeal must adopt in order to test a remand order for reviewability and what tests may be used for the same. This is where the circuits have split.

E. Regarding "*sua sponte*" remands for procedural defects...the negative effect of the premature summary determination by the Ninth Circuit on the question of jurisdiction

In *Kelton Arms Condominium Owners Ass'n v Homestead Insurance Co.*, 346 F.3d 1190 (9th Cir. 2003), the Ninth Circuit itself decided that the District Court was not authorized under 28 U.S.C.§1447(c) to *sua sponte* remand for procedural defects (which is exactly what the District Court attempted to do in the first remand order, (Appendix, *infra*, A-8). The premature determination herein by the Ninth Circuit that §1447(d) prohibited a review of the District Court's orders, has prevented it from reaching the merits of the argument that the District Court erred on this point also.

F. Effect of prior interlocutory orders

In *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273, (9th Cir. 1984), at p.276, the Ninth Circuit decided that interlocutory orders preceding the remand orders are reviewable. Again, the premature jurisdictional determination has prevented the Ninth Circuit from reviewing the eminently appealable matters in the second appeal, 04-16416, such as the decision by the District Court Judge not to recuse themselves, (App., infra, A-20 to A-24). This court needs to clarify the law regarding the effect of a reversal of such a prior interlocutory order on a subsequent remand order.

2) This is a recurring conflict regarding an issue of great practical and fundamental importance.

Questions of federal jurisdiction are primarily questions of constitutional law. Removal jurisdiction, and the right of defendants in State Courts to remove "artfully pleaded" complaints that properly belong in federal court, would be rendered meaningless if District Courts can, without fear of appellate review:

(a) remand such cases on a discretionary basis, or

(b) defeat the right of access to federal Courts without regard to the merits of the removal petition, or

(c) safely remand without proper consideration of the invariably complex preemption analysis.

3) This case squarely presents this conflict, and, furthermore is factually straightforward

This Court can now resolve the critical issue of the scope of the appellate review of such remand orders in a case such as this, involving a predominantly legal matrix without having to deal with complex factual questions.

4) There is clearly, among the lower courts, a widespread misunderstanding of the lessons of *Thermtron, Quackenbush, Carnegie-Mellon* etc.

In this line of cases, this Court has attempted to delineate the scope of such review *re* remands. It is clear that further guidance is needed. Only this Court can end such confusion and bring clarity to this area.

5) Uniformity in Judgments regarding the basic question of jurisdiction of the District Courts

Such uniformity cannot be achieved without immediate intervention by this Court. Especially in the matter of access to federal courts on issues such as copyright law, which is a matter reserved explicitly to the federal courts by Congress, it is important that such discriminatory treatment in the access to federal courts, also in violation of petitioner's constitutional rights, be avoided.

6) The Ninth Circuit's decision to deny jurisdiction is incorrect and should be reversed—the Tenth Circuit approach is the correct one...

The Ninth Circuit should have exercised jurisdiction to review the remand orders. Furthermore, it should have found that the remand orders were not consistent with 28 U.S.C. §1447(c) and should have proceeded to determine the question of federal preemption by itself.

The Ninth Circuit should also have decided the appeal of the interlocutory orders in the second appeal and should have reversed those, including the subsequent remand order. The jurisdiction of any court to determine its own jurisdiction is settled beyond argument.

This Court should approve of the principles adopted by the Tenth and Third Circuits and should clarify this area of law so that there is certainty and uniformity in how jurisdiction of the District Courts is administered in the federal courts across the United States.

CONCLUSION

Petitioner has demonstrated that there is a serious and irreconciliable circuit split as to the reviewability and appealability of remand orders purportedly under 28 U.S.C. §1447(d). The Ninth Circuit's approach and that of the Tenth/Third circuits are diametrically opposed. The first accepts any remand order that simply refers to the relevant statute, and the second always gets its "hands dirty" and actually tests the order/opinion to see if there was attempted a "good faith" analysis of the petition for removal. It is clear that this question is of great significance, going as it does to the very access to federal courts and the "unflagging" duty of the District Courts to keep their doors open when jurisdiction can be established in a removal petition. This is especially so in matters of Copyright Law which Congress has clearly meant to completely preempt any state law claims, however artfully such matters may be pleaded in the state court Complaint. This case presents such a live controversy without factual complications and almost as a pure legal question. Only a timely intervention by this Court could bring consistency to this complex area of law.

This petition for a writ of certiorari should be granted.

Respectfully submitted.

Mani Subramanian — MAY 17, 2005

Petitioner

APPENDIX

ORDERS IN THE NINTH CIRCUIT (Case Nos: 04-16194 and 04-016416 and related District Court orders)

No	Description	Date	REF
1.	Order denying Request for Rehearing (Reconsideration)	Feb 16, 2005	A-2 A-3
2.	Order denying appellate jurisdiction to review District Court orders	Aug 16, 2004	A-4 A-5
3.	Show Cause Order of Ninth Circuit regarding Jurisdiction	Jun 17, 2004	A-6 A-7
4.	District Court Order remanding case to State Court (First Case: No: 04-16194 in the Ninth Circuit)	Apr 29, 2004	A-8
5.	District Court Show Cause Order regarding first removal to Federal Court (First Case: No: 04-16194 in the Ninth Circuit)	Mar 23, 2004	A-9 A-17
6.	District Court Order remanding case to State Court (Second Case: No: 04-16416 in the Ninth Circuit)	Jul 16, 2004	A-18 A-19
7.	District Court "Miscellaneous" Order (Second Case: No: 04-16416 in the Ninth Circuit)	Jul 06, 2004	A-20 A-24

FILED FEB 16 2005 CATHY A. CATTERSON, CLERK
U.S.COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QAD INC., a Delaware corporation; et al Plaintiffs – Appellees, v. MANI SUBRAMANIAN, an individual; et al., Defendants – Appellants, and, DOES 1 THROUGH 50, inclusive, Defendant.	No. 04-16194 D.C. No. CV-04-01035-PJH Northern District of California, San Francisco
QAD INC., a Delaware corporation; et al Plaintiffs – Appellees, v. MANI SUBRAMANIAN, an individual; et al., Defendants – Appellants, ARTHUR ANDERSEN LLP, Defendant.-Appellee.	No. 04-16416 D.C. No. CV-04-01035-PJH Northern District of California, San Francisco **ORDER**

[Order dated Feb 16, 2005 *continued* from previous page]

04-16194

Before; SCHROEDER, Chief Judge, RAWLINSON and CALLAHAN, Circuit Judges

Appellants' August 30, 2004 "petition for rehearing and suggestion for rehearing en banc" is construed as a motion for reconsideration. *See* 9th Cir. R. 27-10. So construed, the motion is denied.

The suggestion for rehearing en banc is denied on behalf for the court. *See* 9th Cir. Gen Ord. 6.11.

No motions for reconsideration, modification, or clarification of this order shall be filed or entertained.

FILED AUG 16 2004 CATHY A. CATTERSON, CLERK
U.S.COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QAD INC., a Delaware corporation; et al Plaintiffs – Appellees, v. MANI SUBRAMANIAN, an individual; et al., Defendants – Appellants, and, DOES 1 THROUGH 50, inclusive, Defendant.	No. 04-16194 D.C. No. CV-04-01035-PJH Northern District of California, San Francisco
QAD INC., a Delaware corporation; et al Plaintiffs – Appellees, v. MANI SUBRAMANIAN, an individual; et al., Defendants – Appellants, ARTHUR ANDERSEN LLP, Defendant.-Appellee.	No. 04-16416 D.C. No. CV-04-01035-PJH Northern District of California, San Francisco **ORDER**

[Order dated Aug 16, 2004 continued from previous page]

04-16194

Before; SCHROEDER, Chief Judge, RAWLINSON and CALLAHAN, Circuit Judges

The Court has reviewed the response to its June 17, 2004 order filed in 04-16194. This appeal and the appeal no. 04-16416 are dismissed. See 28 U.S.C. §1447(d); *Levin Metals, Corp. v. Parr-Richmond Terminal Co*, 799 F.2d 1312 (9th Cir. 1986).

All pending motions are denied as moot.

DISMISSED

FILED JUN 17, 2004 CATHY A. CATTERSON, CLERK
U.S.COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QAD INC., a Delaware corporation; et al
Plaintiffs – Appellees,
v.
MANI SUBRAMANIAN, an individual; et al.,
Defendants – Appellants,
and,
DOES 1 THROUGH 50, inclusive,
Defendant.

No. 04-16194

D.C. No. CV-04-01035-PJH
Northern District of California,
San Francisco

ORDER

A review of the record suggests that this court may lack jurisdiction over the appeal because an order remanding for lack of subject matter jurisdiction generally is not appealable. See 28 U.S.C. § 1447(d).

Within 21 days of the filing date of this order, appellants shall move for voluntary dismissal of the appeal or show cause, appellees may respond within 8 days after service of appellants' memorandum.

[Order dated Jun 17, 2004 continued from previous page]

04-16194

If appellants do not comply with this order, the Clerk shall dismiss this appeal pursuant to Ninth Circuit Rule 42-1.

Briefing is suspended pending further order or the court.

For the Court

s/_____
Karen Reichmann
MotionsAttorney/Deputy Clerk
9th Cir. R. 27-7

General Orders/Appendix A

[Order dated Apr 29, 2004 of District Judge Hamilton]

NOT FOR CITATION
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

QAD INC., et al.,
Plaintiffs
v.
MANI SUBRAMANIAN, et al.,
Defendants
/

No. C 04-1035 PJH
ORDER

The removing parties having failed to establish the presence of a federal question in this action, removed to this court as a consolidated action from the Superior Court of California, County of Santa Clara,[1] the court finds that the case must be REMANDED for lack of subject matter jurisdiction. As a further basis for remand, the court finds that removal was untimely. The motion of QAD, Inc., for an award of costs and fees pursuant to 28 U.S.C. § 1447(c) is DENIED.

IT IS SO ORDERED.
Dated: April 29, 2004

/s/_____
PHYLLIS J. HAMILTON
United States District Judge

FILED 2004 MAR 23PM 5:54 RICHARDW.WIEKING, CLERK, U.S. DISTRICT COURT, NO. DISTRICT OF CA
DISTRICT JUDGE PHYLLIS J. HAMILTON

NOT FOR CITATION
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

QAD INC., et al.,
Plaintiffs
v.
MANI SUBRAMANIAN, et al.,
Defendants
/

No. C 04-1035 PJH
ORDER TO SHOW CAUSE

TO REMOVING PARTIES MANI S. SUBRAMANIAN and VEDATECH, INC., AND THEIR COUNSEL OF RECORD;

YOU ARE HEREBY ORDERED TO SHOW CAUSE IN WRITING no later than April 12, 2004, why the above entitled action should not be remanded for lack of subject matter jurisdiction.

Mani S. Subramanian and Vedatech, Inc., seek to remove two actions originally filed in the Superior Court of California, County of Santa Clara, both previously removed to the San Jose Division of the Northern District of California, and subsequently remanded to the Santa Clara Superior Court. At some point after the remand, the Superior Court, according to the removing parties, consolidated the two cases for all purposes including trial.

On March 15, 2004 the removing parties filed a notice of removal alleging jurisdiction based on the presence of federal question. Under the 28 U.S.C. § 1441(b), "[a]ny civil action

of which the district courts have original jurisdiction founded on a claim or right under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties." The removing parties assert that the case that the case is removable because "certain of the claims alleged in the action arise under the Federal Copyright Act, 17 U.S.C. § 101, et seq." Notice of Removal ¶ 5. They do not specify which claims those might be.

Santa Clara Superior Court case No. CV 771638 was originally filed on January 28, 1998 was removed to the Northern District on July 29, 1998, as case No. C-98-20792-SW; and was remanded on April 10, 2000. Plaintiffs in that action are Qad, Inc., a Delaware corporation, and Qad Japan K.K., a Japanese corporation. Defendants are Mani Subramanian, an individual, and Vedatech, Inc., a Washington corporation. Plaintiffs allege six state-law causes of action- fraud, unfair business practices in violation of California Business & Professions Code § 17200, intentional interference with contractual relationships, trade libel and disparagement of goods and quality, intentional interference with prospective economic advantage, and breach of fiduciary duty.

Santa Clara Superior Court case No. CV 784685 was originally filed on a date unknown; was removed to the Northern District on December 23, 1999, as case No. C-99-21241-SW, and was remanded to the Santa Clara Superior Court on April 10, 2000. Plaintiffs in that action are Vedatech-Japan K.K., a Japanese Corporation, and Mani Subramanian. As alleged in the third amended complaint, filed on or about December 26, 2001 defendants are QAD, Inc.; Qad Japan K.K., Qad Japan, Inc., a Delaware corporation; Arthur Andersen LLP, a limited partnership;

Nomura Research Institute Hong Kong Ltd., a Hong Kong corporation; Nomura Research Institute Ltd., a Japanese corporation; and three individuals of unknown citizenship, John Doordan, Lai Foon Lee, and Isao Tsakatori.

Plaintiffs allege fourteen state-law causes of action in the third amended complaint – breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, constructive fraud, negligent misrepresentation, intentional interference in contractual relations and business advantage, negligent interference in contractual relations and business advantage, Intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, trade libel, disparagement of goods and quality, conversion, breach of fiduciary duty, and unfair competition. [1]

During the period the two cases were pending in the Northern District, they were ordered related by the assigned district judge.[2] The removing parties contend that the effect of the subsequent consolidation by the Superior Court was to transform the two cases into a single case. They claim that the present action – case No. C-04-1035 PJH – is "related to the prior district court actions – C-99-21240 SW and C-98-20792 SW – to the extent those cases are "ghosts" of the two consolidated into one, which is the subject of the Notice of removal.[3] They contend, moreover that case No. C-04-1035 PJH – has "superseded" C-99-21240 SW and C-98-20791 SW, "which no longer exist or are closed."

As a general rule, an action is removable to the federal court only if it might have been brought there originally. 28 U.S.C, § 1441(a). The removal statutes are construed respectively, so as to limit removal jurisdiction. Doubts as to removability are resolved in favor of remanding the case to state court. Shamrock Oil & Gas Corp. v Sheets,

313 U.S. 100, 108-09 (1941); Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). If at any time before final judgement the court determines that it is without subject matter jurisdiction over a removed action, the action must be remanded top state court. 28 U.S.C. § 1447(c).

Removability is ordinarily determined from the face of the complaint. A defendant alleging federal question jurisdiction "may not remove a case to federal court unless the plaintiff's complaint establishes that the cause "arises under' federal law." Franchise Tax Bd. V. Construction Laborers Vacation Trust, 463 U.S. 1,10 (1983). Whether the complaint "arises under" federal law for removal purposes is determined by the same "well-pleaded complaint" rule that determines original federal question jurisdiction. Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475 (1998). It is not enough for removal purposes that a federal question may arise during the course of the litigation in connection with some defense or counterclaim. See Franchise Tax Bd., 463 U.S. at 27-28.

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[1] In addition, on March 9 2000, while this case was pending in district court (as C-99-21241 SW). Qad, Inc., and Qad Japan, Inc. filed counterclaims against Vedatech K. K. and Mani Subramanian.

[2] The removing parties claim that the two cases were "informally consolidated." The removing parties are mistaken. There is no procedure for "informal consolidation" in the district court. Cases may be related if the judge to whom the first-filed case is assigned finds that they meet the criteria in Civil Local Rule 3-12. Alternatively, or in

As "master of the complaint," a plaintiff may avoid federal jurisdiction by relying solely on state law. Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). It is possible, however, that a case may be removable despite a plaintiff's reliance on state law. "Artful pleading" exists where a plaintiff pleads an inherently federal claim in state- law terms. Brennan v. Southwest Airlines Co., 134 F.3d 1405, 1409 (9th Cir. 1998). A state claim "arises under" federal law only if federal law completely preempts the state law. Under such a circumstance, either the state claim is necessarily federal in character, or the right to relief requires resolution of a substantial, disputed federal question. ARCO Environmental Remediation, L.L.C. v. Montana, 213 F. 3d 1108, 1114 (9th Cir. 2000).

In the present case, the removing parties note that the plaintiffs in Superior Court case CV 771638 and the cross-complainants in Superior Court case CV 784685 allege that defendants and cross-defendants, respectively, were "improperly asserting ownership to various intellectual property of QAD, including, but not necessarily limited to, certain computer software." Notice of Removal at ¶ 7 (citing Complaint in CV 771638, ¶ 21 (L), and First Amended Cross-Complaint in CV 784685 ¶ 20 (L).[4] The removing

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addition, cases may be consolidated for some purposes, or for all purposes, as provided by Federal Rule of Civil Procedure 42(a).

[3] The Court is unaware of any authority that might support this proposition

parties claim that they first learned of the presence of a federal "claim in the consolidated state court cases on March 10, 2004, when in response to a special interrogatory propounded in Santa Clara Superior Court case No. 771638, plaintiff Qad, Inc., stated, in part:

> QAD contends that, either directly or through QAD Japan K.K. it paid Vedatech substantial sums of money to perform various localizations and customizations of its MFG/PRO software for use in Japan . QAD further contends that it did or was entitled to acquire all rights. Including any copyrights or copyrightable interests to these localizations and customizations and that, if such rights were not, in fact acquired, the failure to acquire any such rights was due to directly to the improper actions of Mr. Subramanian and Vedatech.

The removing parties claim that the quoted language in QAD's Interrogatory response establishes that QAD "claim[s] a copyright interest in the software underlying the dispute and which forms the basis for QAD's claims" and that QAD's claims "require QAD to prove that it owns valid copyrights in and to the subject software and source code and that Vedatech has harmed QAD's copyright interests by improperly claiming Vedatech had ownership interests in the software." Notice of Removal at ¶¶ 11-12.

Thus, the removing parties are relying on 28 U.S.C § 1446(b), which provides, in part, that

> [I]f the case stated by the initial pleading is not removable, a notice or removal may be filed within thirty days after receipt by the defendant, through

service or otherwise, of copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

QAD's interrogatory response is the "other paper" from which the removing parties claim they learned that case N0. CV 771638 was removable. However, the information supporting removal must be "unequivocally clear and certain" to start the 30-day removal period running. Bosky v. Kroger Texas LP, 228 F.3d 208, 211 (5th cir. 2002). Here, the removing parties have attached a copy of QAD's interrogatory responses as an exhibit to a declaration filed in support of the notice of removal, but have not provided a copy of the interrogatories themselves. Thus, the court is hard-pressed to make any sense of the interrogatory response.[5]

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[4] The docket in district court case No. C-99-21241 SW reflects the filing of a counterclaim, but no cross-complaint. Perhaps a cross-complaint was filled in the state court action(s). In any event, removal cannot be based on a defense, a counterclaim, a cross-claim, or a third-party claim raising a federal question, whether filed in state or federal court. See Franchise Tax Bd. Of Calif. V. Construction Laborers Vacation Trust for So. Calif., 463 U.S. 1, 10(1983); Metro Ford Truck Sales, Inc. v. Ford Motor Co., 145 F.3d 320, 327 (5th Cir. 1998); see also Takeda v. Northwestern National Life Insurance Co., 765 F.2d 815, 821 (9th Cir. 1985) ("[R]emovability cannot be created by a defendant pleading a counterclaim that presents a federal question.")

Plainly, plaintiffs have not asserted a cause of action under the Copyright Act. On its face, the complaint in Superior Court case No. CV 771638 alleges only state law causes of action. The only reasonable interpretation of the notice of removal is that the removing parties are asserting that one or more of the six state-law causes of action in CV 771638 are completely preempted by the Copyright Act. See generally, Rosciszewski v. Arete Assoc., Inc., 1 F. 3d 225 (4th Cir. 1993); see also Idema v. Dreamworks, Inc., 162 F.Supp.2d 1129(C.D. Cal. 2001); Firoozye v. Earthlink Network, 153 F.Supp. 2d 1115 (N. D. Cal. 2001).

Nevertheless, the removing parties have not clarified which of those state-law causes of action should be construed as asserting a claim under federal copyright laws. Where a plaintiff does not plead or assert a federal claim, it is not

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[5] The problem is exacerbated by the fact that the removing parties have not complied with the requirement in 28 U.S.C § 1446(a) that they file, "together with" the notice of removal, "a copy of all process, pleadings, and orders served upon [them]" in the state court action. The removing parties apparently seek to evade that requirement by filing a petition for writ of certiorari, pursuant to 28 U.S.C. § 1447(b). Section 1447(b) provides that, as part of the "procedure after removal generally" (emphasis added), the district court "may require that removing party to file with its clerk copies of all records and proceedings [in the state court] or may cause the same to be brought before it by writ of certiorari issued to such State court." 28 U.S.C. §1447(b). Although this defect is merely procedural, hence correctable, the filing of these documents is required because it is the state law complaint to which the court looks to determine whether it has jurisdiction over the removed action.

enough for removal that the plaintiff might have alleged a federal claim. See Karambelas v. Hughes Aircraft Co., 992 F.2d 971, 975 (9th Cir. 1993). Without more, the removing parties cannot meet their burden of establishing removal jurisdiction in the present case.

The removing parties shall file a copy of this order on all other parties in the consolidated state court actions, no later than March 29, 2004. In addition, the removing parties are hereby ordered to include, with their response to this order to show cause, a proposed amended notice of removal. Any other party to either state court case may file a response to the removing parties' papers, no later than April 26, 2004.

IT IS SO ORDERED.

Dated: March 23, 2004

S/_____

PHYLLIS J. HAMILTON
United States District Judge

[Order dated Jul 16, 2004 of District Judge Hamilton]

NOT FOR CITATION
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

QAD INC., et al.,
Plaintiffs
v.
MANI SUBRAMANIAN, et al.,
Defendants

No. C 04-1806 PJH

ORDER GRANTING MOTION TO REMAND AND DENYING MOTION FOR FEES

/

The motion of QAD, Inc.; QAD Japan K.K.; QAD Japan Inc.; John Doordan; and Lai Foon Lee ("the QAD parties) and Arthur Anderson LLP for an order remanding the above entitled action to the Superior Court of California, County of Santa Clara, came on for hearing before this court on July 16, 2004. The QAD parties appeared by their counsel William D. Connell, Arthur Anderson LLP appeared by its counsel Fred Fields, removing parties Vedatech, Inc., and Vedatech K. K. appeared by their counsel Christina Gonzaga, and removing party Mani Subramanian appeared in pro per.

Having read the parties' papers and carefully considered arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS

the motion to remand for lack of subject matter jurisdiction. As was true when this same action was removed as case No. C-03-1035 PJH, the present notice of removal does not establish the existence of a federal question.

The motion for fees and costs is DENIED. However, should removing parties remove this action yet another time, the court will invite the QAD parties and Arthur Anderson to file a motion for sanctions under Federal Rule of Civil Procedure 11.

IT IS SO ORDERED.

Dated: July 16, 2004

/s/

PHYLLIS J. HAMILTON
United States District Judge

[Order dated Jul 06, 2004 of District Judge Hamilton]

NOT FOR CITATION
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

QAD INC., et al.,
Plaintiffs
v.
MANI SUBRAMANIAN, et al.,
Defendants
/

No. C 04-1806 PJH

ORDER RE MISCELLANEOUS REQUESTS

The request by removing parties Vedatech, Inc., Vedatech K.K., and Mani Subramanian for leave to file a motion for reconsideration or the order relating the above-entitled action to case No. C-04-1035 PJH is DENIED. It is true that the removing parties did not file a notice of related case stating that the present action was related to the remanded case, C-04-1035 PJH, but instead filed a notice stating that the present action was related to a case assigned to Judge Vaughan R. Walker, C-04-1249 VRW. However, in preparing the related case order, the clerk's office added C-04-01035 PJH to the list of possible related cases,[1] on the basis that C-04-1806 was the identical case that had previously been remanded in it incarnation as C-04-1035 PJH. The Court then properly ordered C-04-1806 related to C-04-1035 PJH on the same basis.

In seeking leave to file a motion for reconsideration, the removing parties have not met the standard set forth in Civil Local Rule 7-9. Specifically, the removing parties have not established

> (1) That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the locutory order for which reconsideration is sought …; or
>
> (2) The emergence of new material facts or a change of law occurring after the time of such order; or
>
> (3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order

Civ. L-R 7-9(b).

The removing parties' request that the undersigned district judge recuse herself from presiding over the above-entitled action is DENIED. The removing parties have not met their burden under either 28 U.S.C. § 455(a) or 28 U.S.C. § 144. Under either statute, recusal is appropriate only if " a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." Yagman v. Republic Ins., 987 F.2d 622, 626 (9th Cir. 1993) (quotation omitted). Because a federal judge is presumed to be impartial, the party claiming bias bears a substantial burden to show that the judge is not impartial.

Reiffin v. Microsoft Corp., 158 F. Supp.2d 1016, 1021-22(N.D. Cal. 2001).

Here, the removing parties assert that "resolution of QAD's remand motion (and ...the motion for fees and costs) depends critically on a decision whether the April 29, 2004, order is ambiguous and if so what objective readings/ interpretations it permits." They submit further that "[a]ny additional reasoning or explanation that may be provided now, or any influence of reasoning that is not captured in the order would prevent a fair decision from being rendered on the matter currently before the court.' The removing parties do not, however, provide any substantive explanation of this alleged judicial bias or any examples illustrating such bias. Essentially, they seem to be arguing that the undersigned, having previously remanded the identical action (under a different case number), should not now be permitted to consider whether the same action (under a new case number) should be remanded.

"Bias or prejudice" connotes "a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess...or because it is excessive in degree."

Liteky v. United States, 510 U.S. 540, 550 (1996). Adverse rulings, even if erroneous, generally do not provide a basis for disqualifying a judge under either § 144 or § 455. See

United States v. Grinnell Corp.. 384 U.S. 563, 583 (1966) ("alleged bias or prejudice to be disqualifying must stem from extrajudicial source"); see also Leslie v. Grupo ICA, 198 F.3d 1152, 1160(9th Cir. 1999) (court's adverse rulings are not adequate basis for recusal); Toth v. TWA. Inc.; 862 F.2d 1381 (9th Cir. 1988) (same).

The removing parties have not established the appearance of bias, let alone actual bias. Judicial rulings occurring in the course of a judicial proceeding will "almost never" provide a basis for a recusal motion. Liteky, 510U.S. at 555. Such a motion will be proper only if the rulings "display a deep-seated favoritism or antagonism that would make fair judgement impossible." Id. The removing parties provide no evidence of any deep-seated favoritism or antagonism that stems from an extrajudicial source, and have not established that there is a reasonable question that the undersigned has a wrongful or inappropriate predisposition toward said removing parties.

The removing parties' request for a stay of the present action pending the Ninth Circuit's resolution of defendants' appeal of the April 29, 2004, order remanding case No. C-04-1035 PJH is DENIED. The removing parties have not established good cause for such a stay; rather, they simply assert that the court should grant the request"[f]or the same reasons" cited in support of the request for recusal.

The removing parties' request for a continuance of the hearing on plaintiffs' motion to remand the above entitled

action and plaintiffs' motion for fees and costs is GRANTED. The hearing date is hereby CONTINUED to Wednesday, July 14, 2004, at 9:00 a. m.

IT IS SO ORDERED.

Dated: July 6, 2004

/s/

PHYLLIS J. HAMILTON
United States District Judge

28 U.S.C. § 1447. Procedure after removal generally

[*..,subsections (a) and (b) omitted...*]

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446 (a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

[*...subsection (e) omitted...*]

28 U.S.C. § 1441. Actions removable generally

[*...subsection (a) omitted...*]

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

[*...subsections (d) and (e) omitted...*]